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In re Application of:
Bianchi, John R. et al
Serial No. 10/699,175
Filed: Oct. 31, 2003
Docket: MSDI-434/PC316.08
Title: OPEN INTERVERTEBRAL SPACER

(24/0)
DECISION ON PETITION
UNDER 37 CFR § 1.181

This is a decision on the petition filed Oct. 18, 2007 under 37 CFR 1.181 requesting withdrawal of the finality of the last Office action mailed Aug. 16, 2007.

The petition is **Granted**.

The record shows that the first final rejection of Mar. 19, 2007 was correctly made and the petitioner did not dispute propriety of the final rejection. In response, the applicant filed a RCE on Jul. 20, 2007 with no amendment to the claims. However, the examiner entered new grounds of rejection with new reference and made the Office action of Aug. 16, 2007 final. Since there is no amendment to the claims filed with the RCE, the final Office action of Aug. 16, 2007 in no way was necessitated by any amendment to the claims. Therefore, the final Office action of Aug. 18, 2007, after the RCE of Jul. 20, 2007 is improper and not in accordance with any procedures set forth in M.P.E.P.

In finding petitioner's points of argument persuasive, the requested relief is granted. The finality of the last Office action mailed Aug. 16, 2007 is hereby withdrawn. The examiner has been instructed to treat the amendment filed on Aug. 18, 2007 as if filed under 37 CFR 1.111 and issue an Office action not inconsistent with this decision.

The application was forwarded to Examiner Suzette Gherbi via Supervisory Patent Examiner of Art Unit 3738 for preparation of an Office action in response to the reply filed on Oct. 18, 2007. The reply, a request for reconsideration, will be entered as it is now considered in response to a non-final Office action. Any inquiry regarding this decision should be directed to Henry C. Yuen, Special Programs Examiner, at (571) 272-4856.

PETITION GRANTED.

Karen M. Young
for Frederick R. Schmidt, Director
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